

PUBLIC LAW BOARD NO. 5950

AWARD NO. 4
NMB CASE NO. 4
UNION CASE NO. C-94-S090-1
COMPANY CASE NO. MWA940601AB

PARTIES TO THE DISPUTE:

BURLINGTON NORTHERN SANTA FE
(Former Burlington Northern Railroad
Company)

- and -

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The discipline [five (5) day suspension and letter of censure] imposed upon Mr. D.L. McKeon for alleged violation of Rule 62 in connection with his alleged failure to safely operate Tie Crane BNX 60-00082 on March 22, 1994 was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File C-94-S090-1/MWA 94-7-5AA BNR).
2. As a consequence of the above-stated violation, the Claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD:

D. L. McKeon (Claimant) has been employed by Carrier since 1978, and qualified as a Machine Operator in 1985. On March 22, 1994, the date upon which this dispute arose, Claimant was assigned to Tie Gang TP02 as the Machine Operator on Tie Crane BNX-60-00082. At the end of the work day, Claimant, who was pulling a pushcart loaded with ties, entered a stub track to put his machine away for the evening. Shortly after entering the side track, Claimant ran into Ballast Regulator BNX 06-00294, causing damage to both the boom and the motor. Shortly after the accident, a three (3) man inspection team, comprised of a Foreman and two (2) Traveling Mechanics, inspected Claimant's tie crane. Said inspection revealed no defects with the track or equipment which would have caused a failure in its operation.

As a result of the incident and subsequent inspection ,
Carrier sent Claimant the following letter:

"Arrange to attend investigation in the
Welder's Office, Burlington Northern Depot,
at 14th and Grant Avenue, York, Nebraska, at
1000 hours, Tuesday, April 5, 1994, for the
purpose of ascertaining the facts and
determining your responsibility, if any, for
your alleged failure to safely operate Tie
Crane BNX-06-00082 which struck the head end

of parked Ballast Regulator BNX 06-00294 at or about 1548 hours, Tuesday, March 22, 1994, at Tamora, Nebraska, on stub track. Present in this investigation in addition to yourself will be Gordon McGill, work equipment mechanic. Arrange for representative and/or witnesses, if desired, in accordance with governing provisions of prevailing schedule rules. Please acknowledge receipt and understanding by affixing your signature in the space provided on copy of this letter."

Prior to the investigation, the Organization requested the following:

"I would like to have a copy of the maintenance log for the month of March for the machine that Mr. McKeon was operating. I would also like a copy of the Accident Report that was filed and any documents or statements that were made by Mr. McKeon. I would also understand that their (sic) might have been a three man inspection on this incident. I would like a copy of any and all reports they filed. I would also request that those individuals that were involved in this investigation be made available to attend this investigation."

Carrier provided the requested information.

The investigation was postponed and subsequently held on April 21, 1994. Upon completion of the investigation, Carrier determined that the accident was due to "operator error" and not due to a "mechanical failure" of the machine Claimant was operating. Carrier assessed Claimant discipline of a five (5)

day suspension and letter of censure.

The Organization protested the discipline premised upon the following:

"In reviewing the transcript of the investigation it is clear the discipline assessed is improper and not supported by factual evidence. The first item is the fact this machine had a hydraulic leak and when the crane swung in the proper direction the oil would leak into the brakes as well as the rail. In addition, the throttle on this machine was broken and the Mechanic had simply wired it to 'run it full'. The Mechanic on this gang was well aware of the hydraulic leak, yet he did not repair it. The Machine Operator cannot force the Mechanic to fix an item if they do not want to do it. It is only the Roadmaster or the Mechanic's Supervisor that can force a Mechanic to repair an item.

It is not just the Mechanic on the gang that ignored the oil leak. It appears, through reading the transcript, that the machine had this leak when the gang first started. Therefore, the shop that worked on this machine during the winter also ignored the oil leak. The Mechanic, Gordon McGill, and Mr. McKeon both testified that two (2) new brake shoes were in fact changed on this Tie Crane shortly after it was put back in service. After the oil leak was finally fixed, the Mechanic also used starting fluid to clean the brake shoes on the Tie Crane. This obviously would not have been done if there was not oil on them.

Foreman Ferguson testified that Mr. McKeon

was not operating his machine at an excessive speed and he appeared to be in control.

Due to the above stated reasons I am requesting Mr. McKeon be paid for all time lost account of this improper discipline being assessed. I also am requesting the Claimant's personal record be cleansed of any reference to this incident."

The Organization further asserted that Carrier neglected to allow Claimant to inspect the rail or machine condition for himself, and that although he was allowed to "assist" with the written report regarding the incident, a Carrier clerk had actually written the accident report in which it was stated that the primary cause of the collision was "Code H402", the meaning of which was "unknown" to Claimant, according to the Organization. Finally, the Organization asserted that "unknown" to Claimant and his representative, Carrier's finding of guilt had actually occurred on the date of the incident, March 22, 1994, prior to the actual investigation which was not held until April 21, 1994.

Carrier denied the claim maintaining that:

"I have received your letter of June 2, 1994 appealing the decision to discipline Mr. D. McKeon for violation of Rule 62 of the Burlington Northern Railroad Maintenance of Way Rules for failure to safely operate tie crane BNX 60-00082 on March 22, 1994 at Temora, Nebraska.

In answer to questions raised in your letter, testimony at the investigation conducted by Mr. Chartraw on April 24, 1994 revealed that although the machine may have had a hydraulic leak the 3 man inspection conducted after the incident revealed that the rail was dry and there was no oil on the brake shoes. Further, the fact that the throttle was wired open has absolutely no impact on the braking system whatsoever. You also note in your letter that 2 new brake shoes were changed on the tie crane after it was put back into service. At the same time, the remaining brake shoes were cleaned in accordance with regular maintenance procedures. Finally, your assertion that the Carrier was prejudiced prior to the investigation is simply incorrect."

At the outset, the Organization asserted that Claimant failed to receive a fair and impartial investigation when Carrier's finding of guilt occurred on March 22, 1994, a month prior to the investigation. Additionally, the Organization noted that Claimant was not notified until "just prior to the closing of the investigation" that Rule 62 had been cited as part of the charges leveled against Mr. McKeon. However, those assertions were raised belatedly and numerous awards hold that such objections must be raised during the course of the investigation, or they are considered waived. See for example, Third Division Award No. 22456.

Further, the Organization failed to show how the FRA code entered on the F-27 to describe the accident has, in any way, prejudged Claimant's case. Moreover, the record indicates that both the Claimant and Roadmaster Nutz provided all of the information contained in the F-27 to a trained F-27 Clerk who entered this information into the report just as Claimant and Mr. Nutz described it. In short, there has been no showing by the Organization that any irregularities occurred in the filing of the F-27 report, nor has the Organization shown that the information contained in that report prejudged the Claimant in any way.

Turning to the merits of the issue, there is no dispute that on March 22, 1994, the weather was "clear and sunny". Additionally, the report from the three (3) man inspection team revealed that there was no oil or viscose material on the rail or brake shoes of the Tie Crane which would have impaired or diminished the machine's braking ability. In that connection, Traveling Mechanic McGill, a witness to the accident, testified that the Tie Crane did not have a history of brake problems, nor had the Claimant notified him of any problems with the braking system prior to the accident. Finally, we look to Mr. McKeon's

testimony in which he stated:

- Q. "You had used the brakes previous to the accident to assure that they were working?
- A. Yes. I tapped them on the other side of the crossing to slow down for vehicles. It was clear so I proceeded on.
- Q. But you had used the brakes earlier in the day to stop your machine?
- A. Yes.
- Q. With ties on your push cart?
- A. Yes.
- Q. Did you notice any oil or grease on the rail prior to the incident?
- A. No."

Although much ado has been made of allegations that the Tie Crane's throttle control was not working properly and that hydraulic oil had been leaking from the tie crane's oil well, neither the Claimant nor the Organization offered any evidence on this record to support that contention. Bare assertions are insufficient to carry the evidentiary burden on that point. In fact, in that connection, Mr. McKeon stated:

- Q. When you are working your machine out on the main line, do you operate the machine at full throttle while you are working it?
- A. Yes.
- Q. And when you are working it, do you often start and stop when you are running at full throttle?

A. Yes.

We can only conclude that the above testimony dispelled any contentions relative to the braking capabilities of the Tie Crane when operating at full throttle.

Based on the results of the investigation conducted on March 22, 1994, the date of the incident, and the evidence adduced at the April 21, 1994 investigation, the Carrier has adduced sufficient evidence to carry its burden of proof that Claimant was culpable for the collision. The penalty cannot be deemed arbitrary, unreasonable or excessive. This claim must be denied.

PLB NO. 5950

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NMB CASE NO. 0106

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COMPANY CASE NO. MWA940601AB

10

AWARD

Claim denied.

Nancy Faircloth Murphy

Nancy Faircloth Murphy, Chair

Dated at Memphis, New York on October 27, 1997

Mark Schappaz

Union Member

Dated at Chicago, Ill.
on March 27, 1998

William A. Osborn

Company Member

Dated at Fort Worth, Texas
on November 13, 1997